82-186

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IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

CASE NUMBER

ERNEST WADERE SHAHID, JR.,
PETITIONER.

versus

STATE OF FLORIDA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, ERNEST WADERE SHAHID, JR., by and through his undersigned counsel, respectfully prays that a Writ Of Certiorari issue to review the judgement and decision of the District Court of Appeal of Florida, First District, entered in these proceedings on the 27th day of May, 1982.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, First District, is not reported at the present

time, but is included in the Appendix hereto. The decision of the Circuit Court in and for the First Judicial Circuit of Florida is unreported, but included in the Appendix hereto.

JURISDICTION

The judgment and decision of the District Court of Appeal of Florida, First District, was entered on May 27, 1982. This petition for writ of certiorari is timely filed within sixty (60) days of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). See Williams v. Florida, 399 U.S. 78 (1970); Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE FIRST DISTRICT COURT OF APPEALS' DECISION IN SHAHID V. STATE IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257 ?

II

WHETHER FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISIONS IN SANTOBELLO V.

NEW YORK, 404 U.S. 257 ?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time establish ...

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, and the laws of the United States ...

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, ... nor be deprived of life, liberty, or property, without due process of law; ...

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

assistance of counsel for his defense.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA RULES OF CRIMINAL PROCEDURE

RULE 3.171

PLEA DISCUSSIONS AND AGREEMENTS

(a) In General. Ultimate responsibility for sentence determination rests with the trial judge. However, the prosecuting attorney, the defense attorney, or the defendant, when representing himself, are encouraged to discuss and to agree on pleas which may be entered by a defendant. Such discussion and agreement must be conducted with the defendant's counsel . . . . .

(b) Responsibilities of the Prosecuting Attorney.

(1) A prosecuting attorney may:

(B) Make a recommendation, or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding

upon the trial judge; or . . . . .

(d) Responsiblities of the Trial Judge. After an agreement on a plea has been reached, the trial judge may have made known to him the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, he shall advise the parties of whether other factors (unknown at the time) may make his concurrence impossible.

FLORIDA RULES OF CRIMINAL PROCEDURE
RULE 3.172 ACCEPTANCE OF GUILTY
OR NOLO CONTENDERE

(a) Before accepting a plea of guilty or nolo contendere the trial judge shall satisfy himself that the plea is voluntarily entered . . .

(c) Except where a defendant is not present for a plea, pursuant to the provisions of Rule 3.180(c), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he understands the following:

(vii) The complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result.

(i) Failure to follow any of the procedures in this Rule shall not render a plea void absent a showing of prejudice.

STATEMENT OF FACT

The Petitioner was charged, by direct criminal information with, "Trafficking In Cocaine" in violation of Sec. 893.135 (1)(b) Fla.Stat. (1981) and "Possession Of

Hashish" in violation of Sec. 893.13(1)(e) Fla.Stat. (1981) in the First Judicial Circuit Court of the State of Florida in and for Okaloosa County on March 6, 1981 (A. 1-2).

The Petitioner appeared before the Honorable G. Robert Barron, Circuit Judge in the Okaloosa County Courthouse on March 16, 1981, for arraignment on the foregoing charges (A. 3). Pursuant to plea negotiations between the Petitioner's attorney, J. LaDon Dewrell, and the Assistant State's Attorney, Keith Brace, the Petitioner tendered a plea of nolo contendere to the aforesaid charges (A. 4). In return for his plea, the State agreed to stand mute regarding sentence (A. 7, 24), and to nolle prosequi all lesser offenses arising out of the charged transaction (A. 4-6). After the Petitioner entered his plea, the prosecutor violated his plea agreement to stand mute regarding sentence, when the following colloquy occurred:

> JUDGE: And there is no agreement between the defense and the State as to the sentence which could be imposed upon this defendant, the sentence being solely in the discretion of the Court? Is that correct?
>
> MR. DEWRELL: That's correct your Honor.
>
> MR. BRACE: It is understood by the State that is within the discretion of the Court. It is further understood by the State that the defendant is going to receive the maximum sentence permissible under law, that being 30 years on the trafficking and five years on the possession.
>
> JUDGE: Mr. Shahid, do you understand the

terms and conditions of the plea so far announced by your counsel?

MR. DEWRELL: No sir, he does not because Mr. Brace has just perhaps unintentionally, as my client pointed to me violated one of the tenants of our agreement; specifically, that the State would stand mute as to sentencing in this cause and that would be a matter solely within the discretion of the Court. If I am wrong, correct me, Keith.

MR. BRACE: That may well be, because negotiations have been going on for a week and the terms of the negotiation have changed daily. However, I don't think it's unusual for all parties before the Court to discuss what the sentence is going to be. I don't think that comes as a surprise to anyone. It certainly doesn't come as a surprise to me.

MR. DEWRELL: It's my understanding --

JUDGE: Gentlemen, I might clear this matter up. In order for the State to agree to any sentence or the defense either one to be imposed by the Court, the Court would necessarily have to be part of that agreement. This Court has not agreed to impose any particular sentence. Upon being notified that the defendant was going to plead, it was my understanding that the State was going to secure the guilty or a nolle contendere plea on those two charges. The Court had indicated that unless there were circumstances to alter my position penalty under these charges, but unless I am mistaken in my interpretation of the conference of counsel the Court has not agreed to any particular sentence.

Is that your understanding, Mr. Brace?

MR. BRACE: Not exactly. I am not at all reluctant to take on Mr. Dewrell. I am not quite as anxious to encounter the wrath of the Court. We have had some fairly candid discussions about this case and that is certainly the impression that I have. It's my impression that he is going to get 35 years. I realize that it is not the prerogative of the State Attorney's office to impose sentence. It is certainly within the discretion of the Court and it is not binding on the Court, but that is the impression myself was left with. One further factor that is a condition of this is that the defendant is to remain in custody without bond upon the acceptance of the plea by the Court pending any sentence.

JUDGE: Mr. Dewrell?

MR. DEWRELL: The bail provision as mentioned by Mr. Brace was included and is a part of the negotiated plea in this case, Your Honor. It is my understanding that the Court is to order presentence investigation that the Court will permit, at the defendant's expense, the defendant to be examined by certain physicians for the purpose of reporting to this Court and giving this Court the benefit of their expert opinion within the area of their expertise on any matters that might have bearing upon what would be a proper sentence in this case. That is, particularly when I have objected to Mr. Brace's representation that there's an agreement for Mr. Shahid to receive 35 years. There is an agreement that that is the maximum he could receive, that matter being in the discretion of the Court and not being totally unfamiliar with this Court's disposition as to sentence. It is our desire to have a presentence investigation and the have Mr. Shahid examined by some physicians in the local community and for them to submit in writing their findings to this Court for the Court's consideration in determining an appropriate sentence.

Id., Appendix, pages 7-9.

Despite the prosecutor's admitted violation of the plea bargain, the Court did not, affirmatively, offer the Petitioner an opportunity to withdraw his plea nor did the Court inform the Petitioner that the prosecutor's violation of the plea bargain make it impossible to conform to the terms of that plea bargain.

The prosecutor admitted his promise to stand mute at sentencing in his statement contained in the Petitioner's presentence investigation report (A. 24). Mr. Brace continued to violate his agreement to stand mute at sentencing when he had the recommendation of Sam Brewer of the Okaloosa County Sheriff's Department included in the presentence investigation report that was to be used by the Court in passing sentence. Mr. Brewer's statement recommended the same maximum sentence recommended by Mr. Brace to the Court (A. 24). The Court went on to sentence the Petitioner to 30 years for "Trafficking In Cocaine" with a 5 year consecutive sentence for "Possession Of Hashish"; the maximum sentence on each charge recommended by the prosecutor (A. 44).

The Petitioner filed Notice Of Appeal to Florida's First District Court of Appeals and the State responded with a Motion To Dismiss the Appeal (A. 53-54) on the grounds that the Petitioner had not given the Trial Court an opportunity to withdraw the judgment and sentence. The First District Court of Appeals ordered the Petitioner to show cause why his Appeal should not be dismissed (A. 55) and the Petitioner replied with a Request To Voluntarily Dismiss The Appeal pending a resolution of the violated plea bargain by the Trial Court (A. 58-60). The First District Court of Appeals entered the order requested by the Petitioner dismissing the Appeal without prejudice (A. 61).

Following the Court order, the Petitioner filed his Motion To Vacate Sentence And To Withdraw Plea with the Trial Court (A. 62-63). On October 26, 1981, Judge Barron issued his order denying the Motion To Vacate Sentence And To Withdraw Plea (A. 64). In his

order, Judge Barron made the specific finding in fact that the State did not violate any plea agreement between the State and the Defense (A. 62).

After the Trial Court denied the Petitioner's Motion To Vacate Sentence And To Withdraw Plea, the Petitioner returned to the First District Court of Appeals where his case was docketed under Case No. AI-205. The Petitioner filed his Brief Of Appellant raising the following issue:

> WHETHER THE ASSISTANT STATE ATTORNEY'S VIOLATION OF THE PLEA AGREEMENT TO REMAIN MUTE AS TO APPELLANT'S SENTENCING RENDERS APPELLANT'S NO CONTEST PLEA INVOLUNTARY.

Id., Appendix, pages 65-73.

The State failed to file a Reply Brief and the case was decided by the Court on the merits of the Petitioner's Brief and the Record On Appeal. On April 20, 1982, the First District Court of Appeals of Florida, Per Curiam Affirmed, the judgment and sentence of the Trial Court (A. 74), and the Petitioner timely filed a Motion For Rehearing (A. 75-78). On May 27. 1982, the Petitioner's Motion For Rehearing was denied by Florida's First District Court of Appeals without opinion (A. 79).

The First District Court of Appeal's citation, Per Curiam Affirmed, bars the Petitioner from review by the Florida Supreme Court pursuant to the 1980 Florida Constitutional Amendment. See, Jenkins v. State,385 So.2d 1356, 1359 (Fla. 1980).

REASONS FOR GRANTING THE WRIT

I

THE FIRST DISTRICT COURT OF APPEALS' DECISION IN SHAHID V. STATE, IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

The State of Florida in the person of Mr. Keith Brace, coerced the Petitioner into entering a nolo contendere plea in the above styled cause. The coercion offer was, that the State of Florida would stand mute as to the sentence imposed and would nolle prosequi all lesser offenses arising out of the charged transaction. The transactional immunity offered prevented the Petitioner from receiving any concurrent sentences for offenses arising out of the charged transaction. It did not limit or reduce the length of the sentences received, and offered no real advantage other than to reduce the Petitioner's legal expenses. See, Florida's Single Transaction Rule contained in Brown v. State, 206 So. 2d 377 (Fla. 1968). On the other hand, the prosecutor's promise to "stand mute" in regards to the sentence imposed, offered the Petitioner the very real advantage of receiving less than the maximum sentence. The prosecutor violated his promise to stand mute at the Petitioner's plea hearing and admitted this violation when challenged by the Petitioner's legal counsel. The prosecutor continued to violate his plea

agreement when he included the arresting officer's recommendation of maximum sentence in the Petitioner's presentence investigation report used by the Judge in passing sentence. Despite this dual violation of the plea agreement, the Judge failed to affirmatively offer the the Petitioner an opportunity to withdraw his plea, instead the Judge stated that he was uninfluenced by the prosecutor's recommendation and sentenced the Petitioner to the maximum sentences recommended by the prosecutor.

The facts of the case sub judice and the facts presented in Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971) are all but identical. In both, Santobello and Shahid the prosecutors agreed to "stand mute" in regards to sentence as part of plea agreement. In both Santobello and Shahid the prosecutors agreed to nolle prosequi additional charges as part of the plea agreement. In Santobello the prosecutor nolle prosequi the major charges, leaving Santobello with a misdemeanor charge. In Shahid the prosecutor nolle prosequi the lesser offenses leaving Shahid with the highest offenses charged. In both, Santobello and Shahid the prosecutors violated the plea agreement to "stand mute" as to the sentence imposed. In Santobello this violation of the plea agreement was occasioned by a change in the prosecutors handling the case. In Shahid the prosecution had no such excuse. In both Santobello and Shahid, the Trial Judges disavowed any reliance on the prosecutors violation of the plea agreement in passing sentence. In both, Santobello and Shahid, the Trial Court failed to affirmatively offer the defendants an opportunity to withdraw their pleas. In both, Santobello and Shahid, the Appellate Courts upheld the Trial Court's disavowals.

The facts of the Petitioner's case are so close to the facts presented in Santobello, that there can be no doubt that the First District Court of Appeals, with its, Per Curiam Affirmed, opinion, placed itself in conflict with this Court. Article III, Sec. 1. of the United States Constitution vests the judicial authority of the United States in this Court. Article III, Sec. 2 of the United States Constitution extends this Court's judicial power to all cases in law and equity arising under this Constitution. Williams v. State of Georgia, 75 S.Ct. 814, 349 U.S. 375, 99 L.Ed. 1161 (1955). Florida's First District Court of Appeals has placed itself in express conflict with this Court on a point of law determined by this Court in Santobello v. New York, supra. Egan v. City of Aurora, 81 S.Ct. 684, 365 U.S. 514, 5 L.Ed.2d 741 (1961). The conflict must be resolved in the favor of this Court; this warrants the grant of certiorari. Wilkinson v. United States, 365 U.S. 399 (1961), reh. den., 365 U.S. 890; United Gas Pipeline Company v. Memphis Light, Gas, & Water Division, 358 U.S. 103 (1958).

The facts of the case sub judice also parallel the Third Circuit Court of Appeals' decision in Patrick v. Camden County Prosecutor, 630 F.2d 206 (3rd Cir. 1980), in which the Third Circuit Court of Appeals echoed this Court's decision in Santobello v. New York, supra, holding:

> Although it is not made clear in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), that the violation of a plea bargain by the state involves a defendant's due process right, we are satisfied that such a right is implicated.

The Petitioner agrees with the above statement by the Third Circuit Court of Appeals. The Petitioner's right to "due process" and "equal protection" of law guaranteed him by the Fifth and Fourteenth Amendment to the Constitution of the United States has been abridged by the actions of the Florida Courts.

II

FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

Rule 3.171 of the Florida Rules of Criminal Procedure, titled: plea Discussions And Agreements, must be read in pari materia with Rule 3.172 of the Florida Rules of Criminal Procedure, titled: Acceptance of Guilty or Nolo Contendere Pleas. Since revision of the Florida Rules of Criminal Procedure removed the penalty section of Rule 3.171(d), titled: Responsibilities of the Trial Judge and placed it under Rule 3.172(i), which reads:

> Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.

Under this Rule and Florida case law, a defendant

who suffers a violated plea bargain, must make an affirmative showing of prejudice in order to withdraw his plea. The Petitioner contends that this requirement of Florida law circumvents the safeguards erected by this Court in its decision in Santobello v. New York, supra.

In Shahid v. State, the Trial Judge made the specific statement that he was not relying upon the recommendations of the prosecutor that the maximum sentence be imposed. Since the Trial Judge disavowed reliance upon the prosecutor's recommendation, Shahid could not make the required showing of affirmative prejudice and was not entitled to relief under Florida law.

In Machibroda v. United States, 82 S.Ct. 510, 368 U.S. 487 (1962), this Court held that a guilty plea induced by unkept promises vitiated the voluntariness of the plea and rendered it subject to collateral attack. Since the Florida Rules of Criminal Procedure encourage a defendant to plea bargain, there can be no doubt that the State is involved in coercing a defendant to waive his basic rights. In Santobello v. New York, supra, Mr. Justice Douglas elaborated on the rights surrendered by a defendant when he enters a plea bargain:

> However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of fundamental rights to a jury trial, Duncan v. Louisianna, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, to confront one's accusers, Pointer v. Texas, 380 U.S.

400, 85 S.Ct. 1065, 13 L.Ed.2d 1019, to remain silent, Malloy v. Hogan, 378 U.S. 1, 84 S.ct. 1489, 12, L.Ed.2d 653, and to be convicted by proof beyond all reasonable doubt, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. Since Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009, this Court has recognized that "unfairly obtained" guilty pleas in the federal courts ought to be vacated. In the course of holding that withdrawn guilty pleas were not admissible in subsequent federal prosecutions, the Court opined:...

Because of the importance of the plea bargaining system to the orderly administratioin of the criminal justice system, and because of the fundamental nature of the rights waived, this Court erected certain safeguards to insure the voluntariness of the waiver. One of those safeguards is that when a plea rests in any significant degree on a promise or agreement of a prosecutor, that promise or agreement must be fulfilled. Any breech of a promise or agreement that forms a basis of a plea bargain must result in the defendant being given an affirmative opportuntiy to withdraw his plea and go to trial on the merits. Failure to allow this opportunity to a defendant is to deny him fundamental fairness. Florida Rules of Criminal Procedure 3.172(l) deny a defendant fundamental fairness. This Rule requires the defendant to make two (2) showings: first, that the plea bargain has been violated, and, second, that he has been prejudiced thereby. The second showing is almost impossible to make.

Florida Rules of Criminal Procedure 3.172(l) is Unconstitutional and repugnant. It expressly conflicts with

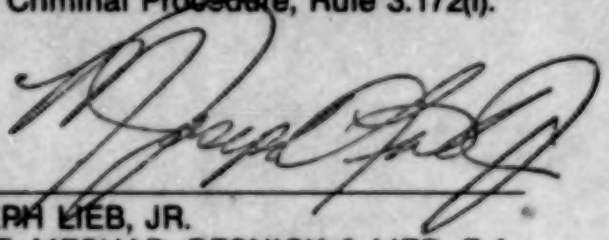
this Court's decision in Santobello v. New York, supra, and denies the Petitioner due process of law guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States. It has abridged his right to a fair trial guaranteed him by the Sixth Amendment to the Constitution of the United States and it has denied him equal protection of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

This Court has traditionally been concerned with constitutional questions relating to the validity of State criminal procedures. See, Jackson v. Denno, 378 U.S 368 (1964). Important Constitutional questions which relate to the effective administration of the criminal justice system have long been held sufficient to invoke the certiorari jurisdiction of this Court; in particular questions involving plea bargaining provide a sound basis for the issuance of the writ. See, Santobello v. New York, supra.

This case presents an important issue of Constitutional dimensions concerning the effective administaration of the criminal justice system. The improper manner in which the State of Florida has applied the dictates of Santobello v. New York, supra, and the lack of uniformity with which this decision has been applied warrants the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court issue a Writ Of Certiorari to review the decision of Florida's First District Court of Appeals in Shahid v. State, and the Constitutionality of Florida Rules of Criminal Procedure, Rule 3.172(i).



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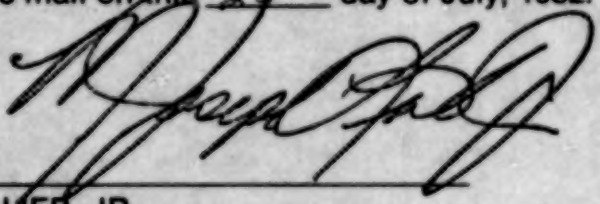
Counselor For Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing Petition For Writ Of Certiorari upon the Honorable Jim Smith, Attorney General, Florida Department of Legal Affairs, State Capitol, Tallahassee, Florida 32304, by placing same in a sealed postage prepaid envelope and depositing it in the United States mail on this 23rd day of July, 1982.



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Counsel For Petitioner

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ERNEST W. SHAHID, JR.,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE
Appellant,	)	REHEARING PETITION AND DISPOSITION
vs.	)	THEREOF IF FILED.
STATE OF FLORIDA,	)	CASE NO. AI-205
Appellee.	)	

Opinion filed April 20, 1982.

An Appeal from the Circuit Court for Okaloosa County.

Larry Byrd, Sarasota, and M. Joseph Lieb, Jr., Sarasota, for Appellant.

No Response for Appellee.

PER CURIAM.

AFFIRMED.

ERVIN, SHIVERS, and WENTWORTH, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32301
Telephone No. (904) 488-6152

Date: May 27, 1982
CASE NO. AI-205

ERNEST W. SHAHID, JR. VS. STATE OF FLORIDA

Appellant/Petitioner Appellee/Respondent

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

The following action was taken in the above-styled case on the above date:

Request for oral argument DENIED.
Motion for rehearing DENIED.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Larry Byrd, Esquire, Sarasota, Florida
M. Joseph Lieb, Jr., Esquire, Sarasota, Florida
Jim Smith, Attorney General, Tallahassee, Florida

Deputy Clerk

Office - Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS,
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82-186

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ERNEST WADERE SHAHID, JR.,
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STATE OF FLORIDA,
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APPLICATION FOR BAIL PENDING CERTIORARI

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FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

CASE NUMBER

ERNEST WADERE SHAHID, JR.,
PETITIONER.

versus

STATE OF FLORIDA,
RESPONDENT.

APPLICATION FOR BAIL PENDING CERTIORARI

To the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice of the Eleventh Circuit:

1. Applicant was convicted on March 16, 1981, on one (1) count of "Trafficking In Cocaine" (A. 2) and one (1) count of "Possession of Hashish" (A. 1) in the First Judicial Circuit Court in and for Okaloosa County, Florida. On April 10, 1981, he was sentenced to thirty-five years imprisonment and committed to the Florida Department of Corrections (A. 51)

2. The trial court established the Applicant's bail at one-hundred thousand dollars ($100,000.00) on the foregoing charges. The Applicant has been barred from

seeking post trial release on the foregoing bail by his surrender of his right to bail as one of the conditions of his "plea agreement" with the State of Florida (A. 8-9). The "plea agreement" was subsequently violated by the State of Florida by the prosecutor's failure to stand mute at sentencing (A. 62-63).

3. The Applicant is not an extraordinary bail risk. He has been placed on bail on three (3) prior occasions and he has never forfeited a bond or been cited for failure to appear (A. 22-23). The Applicant maintains a residence with his father in Destin, Florida, where he has lived for the majority for his thirty-nine (39) years (A. 23). The Applicant has no prior history of violence and he will not be a threat to the public if released on bail pending certiorari (A. 22-23).

4. The questions being raised in the Petition For Writ Of Certiorari are substantial in nature. Those questions are: 1) the denial of "due process" and "equal protection" of law by Florida's First District Court of Appeals' decision in Shahid v. State, which expressly conflicts with this Court's decision in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), and 2) the constitutionality of Florida Rules of Criminal Procedure 3.171 and 3.172, which circumvents the safeguards erected by this Court in Santobello v. New York, supra, to protect the rights of defendants who enter into the plea bargaining process.

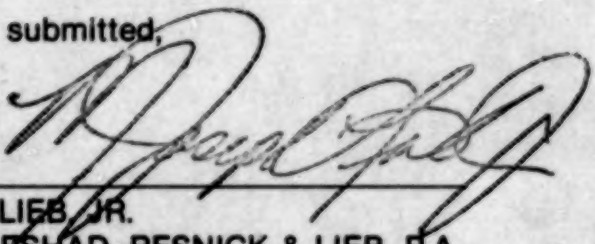
5. There has been no claim by the State of Florida that the foregoing points are frivolous or taken in bad faith for the purpose of delay. Indeed, there can be no such claim since the position taken by the First District Court of Appeals of Florida in the case sub judice is

in express conflict with the position taken by the Court in an identical fact situation.

6. There has been no delay in prosecuting the Applicant's appeal and in filing this Petition For Writ Of Certiorari, and the Applicant's admission to bail will in no way prolong the proceedings before this Court.

7. Wherefore, the Applicant prays that he may be admitted to bail pending certiorari in a sum not to exceed one-hundred thousand dollars ($100,000.00).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Application For Bail Pending Certiorari, upon the Honorable Jim Smith, Attorney General, Florida Department of Legal Affairs, Capitol Building, Tallahassee, Florida 32304, by placing same in a sealed postage prepaid envelope and depositing it in the United States Mail on this 23rd day of July 1982.

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-186

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

ERNEST WADERE SHAHID, JR.,
PETITIONER,

versus

STATE OF FLORIDA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO
THE DISTRICT COURT OF APPEAL, FIRST
DISTRICT, STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I WHETHER THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN SHAHID V. STATE IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

II WHETHER FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

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PRELIMINARY STATEMENT

References to the appendix filed by petitioner will be made by the symbol "A" followed by appropriate page number.

OPINION BELOW

The per curiam affirmance, without opinion, of the Florida First District Court of Appeal is reported at 415 So.2d 1368.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for purpose of determining whether to decline assumption thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on pp. 3-5 of petitioner's petition for writ of certiorari.

STATEMENT OF THE CASE

Respondent accepts petitioner's Statement of Fact as set forth in the petition with the exception of the allegation that the prosecutor admitted violation of the plea bargain. Respondent denies this. Further, respondent denies that the prosecutor "had the recommendation of Sam Brewer of the Okaloosa County sheriff's department included in the presentence investigation. . . ." Additional references to the facts will be made in the argument portion of this brief.

ARGUMENT I

I WHETHER THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN SHAHID V. STATE IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

A. Petitioner seeks to raise a constitutional issue for the first time before this Court. At no time in any of the lower courts did petitioner raise the claim that the alleged violation of the plea-bargain agreement by the prosecutor was of constitutional dimension. In fact, the case of Santobello v. New York, 404 U.S. 257 (1971), was never cited in any of petitioner's briefs or pleadings filed in the state courts. In the joint appendix filed by petitioner this Court will not find a citation to Santobello v. New York.

Petitioner attempts to convert a simple finding of fact by a state court trial judge (A-64) into a viable federal constitutional issue. A similar effort was made

in Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 102 S.Ct. ___ (1982), and appropriately rejected as follows:

> While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law.

Id. at 796. If such a practice were permitted, then every erroneous decision by a state court on state law would likely find its way to this Court clothed as a federal constitutional question. Isaac, 71 L.Ed.2d, at 796, n. 21

Petitioner's failure to identify when and how the federal constitutional issue was raised in the lower court is a tacit admission that it is raised for the first time before this Court. Unless this Court is ready to depart from the rationale of Cardinale v. Louisiana, 394 U.S. 437 (1969), this is not permissible. In

Cardinale, the Court remarked in pertinent part as follows:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.

Id. at 438.

B. It is the position of respondent that the prosecutor did not breach the plea-bargain agreement. At the hearing on March 16, 1981, when the plea of nolo contendere was tendered and accepted, the plea-bargain agreement was spread on the record and for the convenience of the Court is quoted below:

> MR. DEWRELL: Yes sir. If it please the Court, pursuant to plea negotiations between myself with consent of Mr. Shahid and Mr. Brace of the office of the State Attorney, we have reached a negotiated plea as it relates to all charges, known or unknown, presently pending against Mr. Shahid.

That plea, as I understand it, is that Mr. Shahid will enter a plea of nolo contendere to Count 1 and Count 2 of the information, filed directly by the office of the State Attorney under date 16 March 1981. All other charges and all other criminal activity, known or unknown, on behalf of Mr. Shahid cccurring prior to the date of 16 March 1981 will not be pursued by the State of Florida in return for the plea they have entered in Count I and Count 2 of this information.

MR. BRACE: If it pleases the Court, perhaps we had better have a little clarification on that. It is agreed by the State that the two counts of delivery that are presently before this Court is scheduled for trial on April 13th of tbis year and will be dismissed upon acceptance of this Court of this plea, but any activities arising out of the investigation associated with this case that is presently before the Court will not be prosecuted. I have not intended to give Mr. Shahid carte blanche immunity from any criminal activity he may have been involved in prior to today's date that I have no knowledge of. I certainly don't intend for the Court to be under that impression.

MR. DEWRELL: It's my understanding that immunity from prosecution would extend not only to the two pending counts or the two counts that are presently

pending pursuant to a mistrial, but to any other criminal activity arising out of those particular transactions or the prosecution of those particular transactions including any lesser offenses therein. Is that correct?

MR. BRACE: Yes.

MR. DEWRELL: O.K. So what we are speaking of is transactional immunity for any charges or any matters arising out of the charges that Mr. Shahid has pending in Circuit Court in and for Okaloosa County, Florida.

JUDGE: Is that the position of the State and the Defense? Is that correct?

MR. DEWRELL: Yes sir.

JUDGE: I think the parties' positions have been pretty well stated on the record. The State's immuunity, of course, does not run to any criminal activity which he may or may not have been involved in that does not arise out the investigation or the charges that are presently pending or have been pending before this Court. Is that the agreement of the parties?

MR. BRACE: That is the intent of the State.

MR. DEWRELL: That is my understanding, Judge.

(A-4,5,6) Respondent finds nothing in the terms of the plea-bargain agreement requiring the prosecutor to stand mute at sentencing.

The colloquy quoted on pp. 6,7,8 of the petition is taken from the hearing at the time the pleas of nolo contendere were entered on March 16, 1981, not from the sentencing hearing subsequently held on April 10, 1981 at which the sentence was imposed. (A-26) At this hearing, the prosecutor did indeed stand mute, making no recommendation one way or the other to the trial judge as to what sentence, if any, should be imposed. The presentence investigation report supports this. (A-24)

Petitioner contends on p. 8 of the petition that following the alleged violation of the plea-bargain agreement the court did not affirmatively offer petitioner an opportunity to withdraw his plea. This is interesting because at this

point in the proceedings the pleas had only been tendered, not accepted by the trial judge. Rather than indicating a desire to withdraw his tendered pleas of nolo contendere, petitioner followed through by giving sworn testimony in support of the voluntariness of those pleas. (A-11-17) It was only after determining that the pleas had been freely and voluntarily entered that the trial judge accepted them. (A-17, line 24--A-18, line 3)

The allegation that petitioner was coerced into entering the nolo contendere plea found on p. 11 of the petition is interesting. If petitioner was coerced into entering the pleas of nolo contendere, then he lied under oath. Note the following:

> Q. The charges against you to which you are entering a plea is one count of trafficking in cocaine and one count of possession of hashish. The maximum sentence which this Court could impose upon you under those pleas

is 30 years for Count I and five years for Count 2, the maximum sentence therefore being 35 years which could be imposed. Do you understand that the actual sentence which will be imposed is at the sole discretion of this Court?

A. Yes sir.

Q. Have there been any threats, force, pressure or intimidation upon you in order to force you to plead nolle contendre?

A. No sir.

Q. Have there been any promises made to you other than in open Court today and as fully discussed in open Court?

A. No sir.

(A-13,14)

Petitioner's complaint that the prosecutor violated the plea-bargain agreement by including the arresting officer's recommendation therein is something made up out of whole cloth. A Florida prosecutor has no control over what goes into a presentence investigation report other than his own statement which

is set forth under the heading "Court Officials, Statement." (A-24) The compilation of such a report is done by an appropriate employee of the Florida Department of Corrections, Parole and Probation Services. See § 948.01(2), F.S. (1981). In the instant case, the presentence investigation report was compiled by Raymond K. McShane, Parole and Probation Supervisor. (A-25)

Petitioner has suffered no deprivation of due process, United States ex rel. Robinson v. Israel, 603 F.2d 635 (7th Cir. 1979), cert.denied, 444 U.S. 1019; the plea bargain as spread upon the face of the record was not broken, Williams v. Wainwright, 604 F.2d 404 (5th Cir. 1979); and the trial judge did not violate any plea-bargain agreement, Jones v. Petrovski, 631 F.2d 595 (8th Cir. 1980); petitioner is entitled to no relief from this Court.

II WHETHER FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

Again, petitioner presents this Court with an issue that was never raised in the courts below. No mention was made in any of the pleadings filed in the lower courts of Rule 3.172, Florida Rules of Criminal Procedure. In fact, the rule is not cited once in the joint appendix filed by petitioner.

In his argument under this point, petitioner assumes that he was denied relief in the state courts because of his failure to show prejudice. This is incorrect. Petitioner's motion to vacate sentence and to withdraw plea (A-62) was denied by the state court trial judge, not on the ground that petitioner had failed to show resultant prejudice, but on the ground

that there had been no breach of any plea-bargain agreement in the first instance. (A-64) Consequently, petitioner's argument that the cited rule collides with Santobello v. New York is fatally flawed.

A cursory reading of the rule will show that it has nothing to do with a breach of a plea-bargain agreement; it only requires that the trial judge address a defendant personally and determine, inter alia, that the defendant understand the complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result. Rule 3.172(c)(vii), Florida Rules of Criminal Procedure. Again, the consitutionality of the rule was never challenged in the lower courts and the issue presented to this Court for the first time is, in effect, a willful repudiation of this Court's decision in Cardinale v. Louisiana, supra.

CONCLUSION

The petition for writ of certiorari should be denied.

JIM SMITH
Attorney General

By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief for Respondent in Opposition to Mr. Joseph Lieb, Jr., Syprett, Meshad, Resnick & Lieb, P.A., 1900 Ringling Boulevard, P. O. Box 1238, Sarasota, Florida 33578, counsel for petitioner, by U.S. Mail, this _____ day of October 1982.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

Office-Supreme Court, U.S.
FILED
NOV 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

CASE NUMBER 82-186

ERNEST WADERE SHAHID, JR.,

PETITIONER.

versus

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

REPLY BRIEF FOR PETITIONER

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REBUTTAL PRESENTED

I

THE ATTORNEY GENERAL'S STATEMENT THAT "IF PETITIONER WAS COERCED INTO ENTERING THE PLEAS OF NOLO CONTENDERE, THEN HE LIED UNDER OATH" IS CONTRARY TO THE RECORD BEFORE THIS COURT.

II

THE PETITIONER RELIED UPON THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257 (1971), IN HIS BRIEF OF APPELLANT TO FLORIDA'S FIRST DISTRICT COURT OF APPEAL WHEN HE CITED STATE CASES WHICH RELIED UPON SANTOBELLO V. NEW YORK, SUPRA, AS SOURCE AUTHORITY.

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I: THE ATTORNEY GENERAL'S STATEMENT THAT "IF PETITIONER WAS COERCED INTO ENTERING THE PLEAS OF NOLO CONTENDERE, THEN HE LIED UNDER OATH" IS CONTRARY TO THE RECORD BEFORE THIS COURT. 1

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357 So.2d 1060 (Fla. 1st DCA 1978) 5

ARGUMENT

I

THE ATTORNEY GENERAL'S STATEMENT THAT "IF PETITIONER WAS COERCED INTO ENTERING THE PLEAS OF NOLO CONTENDERE, THEN HE LIED UNDER OATH" IS CONTRARY TO THE RECORD BEFORE THIS COURT.

The Attorney General of the State of Florida on page 9 of his "Brief For Respondent In Opposition" states, "The allegation that petitioner was coerced into entering the nolo contendere plea found on p. 11 of the petition is interesting. If petitioner was coerced into entering the pleas of nolo contendere, then he lied under oath." This statement by the Attorney General for the State of Florida has no factual basis in the Record before this Court. To support this unfounded allegation, the Attorney General cites portions of the Record out of context in such a way as to be misleading. The portion of the rights colloquy quoted by the Attorney General is as follows:

> Q. Have there been any threats, force, pressure or intimidation upon you in order to force you to plead nolle contendere?

A. No sir.

Q. Have there been any promises made to you other than in open Court today and as fully discussed in open Court?

A. No sir.

Id., Joint Appendix, page 14. The proceeding part of the colloquy omitted by the State in its citation goes as follows:

> JUDGE: And there is no agreement between the defense and the State as to the sentence which could be imposed upon this defendant, the sentence being solely in the discretion of the Court? Is that correct?
> MR. DEWRELL: That's correct, your Honor.
> MR. BRACE: It is understood by the State that it is within the discretion of the Court. It is further understood by the State that the defendant is going to receive the maximum sentence permissible under the law, that being 30 years on the trafficking and five years on the possession.
> JUDGE: Mr. Shahid, do you understand the terms and conditions of the plea so far announced by your counsel?
> MR. DEWRELL: No sir, he does not because Mr. Brace has just perhaps unintentionally, as my client pointed out to me violated one of the tenants of our agreement; specifically, that the State would stand mute as to sentencing in this cause and that would be a matter solely within the discretion of the Court. If I am wrong, correct me, Keith.
> MR. BRACE: That may well be, because negotiations have been going on for a week and the terms of the negotiation have changed daily. However, I don't think

it's unusual for all parties before the Court to discuss what the sentence is going to be. I don't think that comes as a surprise to anyone. It certainly doesn't come as a surprise to me.

Id., Joint Appendix, page 7. Obviously, the prosecutor's promise to stand mute as to the sentence imposed was one of the promises fully discussed in open Court. When Judge Barron asked the Defendant, "Have there been any promises made to you other than in open Court today and as fully discussed in open Court?" he exempted the prosecutor's promise to stand mute since that promise had already been fully discussed. It is evident, when reading the colloquy as a whole, that Petitioner did not perjure himself.

ARGUMENT

II

THE PETITIONER RELIED UPON THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257 (1971), IN HIS BRIEF OF APPELLANT TO FLORIDA'S FIRST DISTRICT COURT OF APPEAL WHEN HE CITED STATE CASES WHICH RELIED UPON SANTOBELLO V. NEW YORK, SUPRA, AS SOURCE AUTHORITY.

The Attorney General in his Brief For Respondent In Opposition, states that the Petitioner did not rely upon this Court's decision in Santobello v. New York, supra, as source authority in his Appeal to Florida's First District Court of Appeal. Respondent is wrong.

While it is true that the Petitioner did not cite Santobello v. New York, supra, in his Brief of Appellant, the Petitioner did rely upon it as source authority through his citation of Wood v. State, 346 So.2d 143, 144 (Fla. 1st DCA 1977) and State v. Schelter, 309 So.2d 59, 60 (Fla. 2d DCA 1975). Both of these cases relied on this Court's decision in Santobello v. New York, supra. In Wood v. State, supra,

the First District Court of Appeal cited Santobello, holding:

> Appellant relies heavily upon Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), in which the United States Supreme Court remanded a somewhat similar case to the state court when it found the plea bargain agreement had been violated by the State. The prosecuting attorney had agreed he would make no recommendation as to sentence, but at sentencing another prosecutor, who replaced the prosecutor who had negotiated the plea, recommended the maximum sentence.

Id., Wood v. State, page 144. The Petitioner in his Brief Of Appellant to Florida's First District Court of Appeals, cited Wood v. State, supra, in the following context:

> "The plea bargaining agreement involved herein is sometime referred to as the Adams type, to-wit: that the prosecutor will make a recommendation at sentencing but that this recommendation (or lack of recommendation as here) is not binding upon the Court. State v. Adams, 342 So.2d 818 (Fla. 1977). As stated in Wood v. State, 357 So.2d 1060 (Fla. 1st DCA 1978):
>
> > "...The agreement inducing the plea is completely fulfilled when the prosecutor makes his recommendation as agreed; . . ."
>
> If the terms of the plea agreement are that the prosecutor will stand mute at sentencing, as in this case, then the prosecutor has fulfilled his agreement if he does just that, stands mute. Wood v. State, 346 So.2d 143 (Fla. 1st DCA 1977)."

Id., Joint Appendix, page 70. There can be no doubt that, from the foregoing text, the Petitioner relied upon Santobello v. New York, supra, sub nomine Wood v. State, supra.

In State v. Schelter, 309 So.2d 59, 60 (Fla. 2d DCA 1975), the Second District Court of Appeal cited Santobello v. New York, supra, in its opinion:

> We cannot say that the State has an affirmative duty to disclose other pending charges of which it has knowledge to a defendant when bargaining a plea on a separate charge. It also is not a denial of fundamental due process. In securing agreements under Criminal Rule of Procedure 3.171 between an accused and a prosecutor, such negotiations should be conducted in such a manner to be completely fair to both the accused, and the State. Santobello v. New York, 401 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. If in fact Deputy Mathews misled the appellee, the plea bargaining negotiations were not conducted in a fair manner and the appellee entered his guilty plea under a misapprehension of the true facts.

Id., State v. Schelter, page 60. The Petitioner, in his Brief of Appellant, cited State v. Schelter, supra, in the following context:

The fact that the Court is not bound by the prosecutor's recommendation, and the defendant is so informed by the Court at sentencing, does not excuse the prosecutor's violation of the plea agreement. As the Court stated in Crossin v. State, 262 So.2d 250 (Fla. 4th DCA 1972):

> "Although the Court was not bound by these negotiations, the State was bound either to make the recommendation as it had promised, or to advise appellant, prior to the withdrawal of her not guilty plea, that it could not do so. Ward v. State, 1945, 146 Fla. 185, 22 So.2d 887. The state having failed to keep its end of the bargain, the plea became in essence an involuntary one."

If the State breaks any promises it made in reference to the plea agreement, the agreement becomes involuntary as is stated in State v. Schelter, 309 So.2d 59 (Fla. 2d DCA 1975):

> "If, upon remand, the Trial Court determines that the appellant was misled by the statements of Deputy Mathews or that the State has broken any promises which it made pertaining to the negotiations for the plea, the Trial Court has the discretion as to what ultimate relief should be granted appellees, i.e.: allow him to withdraw the plea of guilty induced by the negotiations or the dismissal of the second charge involved in the instant cause."

Id., Joint Appendix, pages 70-71.

From the foregoing citations from the Brief Of Appellant

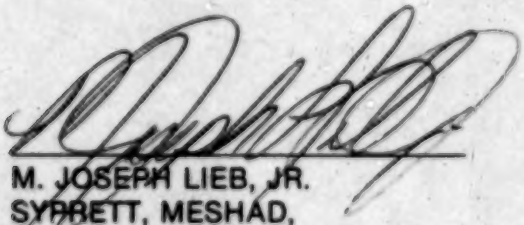
and the cases cited therein, there can be no doubt that the Petitioner relied upon Santobello v. New York, supra, as source authority sub nomine Wood v. State, supra, and State v. Schelter, supra.

The Court should know that in the lower court the Respondent, State of Florida, never filed an answer brief. Had the Respondent done so, surely Santobello, sub nomine, State v. Schelter and Wood v. State, would have been established. The failure of the Respondent to file its brief in the Court below explains Respondent's unfamiliarity with this cause. A reading of either State v. Schelter or Wood v. State shows both those cases are based on Santobello.

Accordingly, the Petitioner submits that he has fully and correctly presented the claims listed in this Petition to the lower court.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court issue a Writ of Certiorari to review the decision of Florida's First District Court of Appeals in Shahid v. State, 415 So.2d 1368 (Fla. 1st DCA 1982), and the constitutionality of Florida Rule of Criminal Procedure, 3.172(i).



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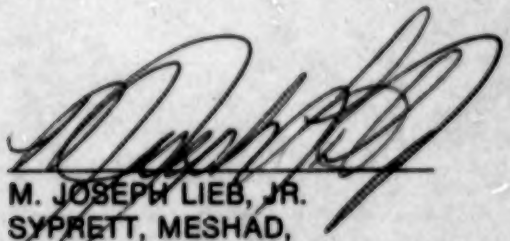
CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of this Reply Brief upon the Honorable JIM SMITH, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, and WALLACE E. ALLBRITTON, Assistant Attorney General, Department of Legal Affairs, The Capitol, 1502, Tallahassee, Florida 32301, by placing same in sealed posted prepaid envelopes and depositing them in the United States mail on this 8th day of NOVEMBER, 1982.



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